IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-678

Supreme Court, U. S.
FILED
MAY 1 1972

[illegible]

[illegible] JET AVIATION, INC., ET AL., *Petitioners*,

v.

[illegible] CLEVELAND, OHIO, ET AL., *Respondents*.

On Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE PETITIONERS

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EXECUTIVE JET AVIATION, INC., ET AL., *Petitioners,*

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On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. for Cert., App. A, pp. 1a-26a) is reported at 448 F.2d 151. The opinion of the district court (Pet. for Cert., App. B, pp. 27a-42a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered August 24, 1971. The petition for a writ of certiorari was filed November 19, 1971, and was granted February 22, 1972. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Do the federal courts have maritime jurisdiction over airplane crashes in navigable waters where the cause of the crash is alleged to be tortious conduct which occurred on land?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. CONST. art. III:

§ 2. *Jurisdiction of Courts*

The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction; . . .

United States Code (U.S.C.), Title 28:

§ 1333. *Admiralty, maritime and prize cases*

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction. . . .

STATEMENT OF THE CASE

On July 28, 1968, a corporate jet aircraft known as a Falcon Mystere M-20, Registration N367EJ (hereinafter referred to as the Falcon), owned by petitioner Executive Jet Sales, Inc. and operated by petitioner Executive Jet Aviation, Inc.[1] crashed in the navigable

[1] Hereinafter petitioners will be referred to collectively as "EJA."

waters of Lake Erie after striking several hundred seagulls shortly after takeoff from Burke Lakefront Airport at Cleveland, Ohio (hereinafter referred to as the airport). The airport is owned, operated and maintained by respondent the City of Cleveland, Ohio, and at the time of the crash respondent Phillip A. Schwenz [2] was employed by the City as manager of the airport and was acting in the scope and course of his employment (A. 2, 3, 7, 8). Respondent Howard E. Dicken was employed by the United States Federal Aviation Administration (FAA) at the time of the crash and was acting in the scope of his employment as an Air Traffic Controller when he issued a clearance from the airport tower to the Falcon for takeoff (A. 3, 5).

What happened at the time of this crash is succinctly stated by the two pilots flying the Falcon in a statement given by them two days after the accident to the National Transportation Safety Board during the course of the official investigation of this accident (A. 13-15). That statement reads:

STATEMENT OF WITNESS

July 30, 1968

Pilot Statement: W. P. Flower, P/C

C. Dirck, C/P

The Aircraft—EJ 367—arrived at Burke Lakefront July 26 approximately 1600 hours. It was immediately refueled by Remmert-Warner, secured and the crew departed to the motel. The crew consisted of W. P. Flower, P/C, C. Dirck, C/P, and Miss J. Vargo, Hostess.

[2] Hereinafter respondents, the City of Cleveland, Ohio, and Phillip A. Schwenz will be referred to collectively as "the City."

On the 28th at approximately 1000 hours, the crew arrived at Lakefront for a ferry flight to Portland, Maine, picking up passengers and continuing to White Plains, N. Y. The aircraft was uncovered and preflighted by the First officer. The Hostess made a final inspection of the cabin in preparation for picking up passengers and the Captain obtained the weather, filed a flight plan, and obtained a release from the Company dispatcher. After engine start we received clearance to taxi to Runway 6 Left. As the flight was non-revenue it is company policy for the first officer to fly in the left seat for proficiency and training. The first officer was flying from the left seat, the captain in the right seat, and the Hostess was seated in the first seat on the right side facing aft.

The check list was completed and on taxiing out, it was noted that one aircraft was on landing rollout on 6 Left, and ground advised an aircraft was on the approach to 6 Right. The ground advised to expedite across 6 Right. At this point there were, to my knowledge, no advisories regarding birds from ground control. In obtaining the weather by phone for Cleveland, Portland, and White Plains, there was no information given regarding birds as would appear on the end of the Cleveland sequence. On instructions, the pilot in the right seat, switched to tower frequency, and requested take-off. The take-off clearance initially was faded with the final portion of the statement saying something to the effect "Caution, birds *on end* of runway." These exact remarks can be substantiated by the tower tape. The bird caution to me was a routine advisory as would be given for a few or small number of birds. The transmission did not possess extreme hazard information. As the take-off clearance was not clear a second request was made and a second clearance was issued for take-off. Neither pilot could see

the birds on the end of the runway. After clearance to take-off was received the pilot in the left seat executed the take-off and rotated at approximately 125 Kts. The pilot in the right seat made a power check, voiced 30 Kts., 100 Kts., V_1 and rotate. The pilot in the left seat could not distinguish the bird line prior to rotation and in his estimation could not abort the take-off. On rotating a sea of birds on the runway became visible. Approaching the birds at approximately 75 feet caused them to flush and fly into the aircraft, apparently hundreds hitting the belly and engine intakes. Bird impact substantially reduced the air speed an estimated 15 or 20 Kts. The pilot in the left seat raised the gear handle, the pilot in the right seat maneuvered the throttles in an effort to obtain partial power. There was almost immediate total loss of power. The engine temperature indicated above 850 degrees on both engines and the RPM dropped rapidly below 70%. The aircraft flew in a semi-stalled attitude stall horn blowing until contacting the water. The aircraft struck the top of a pick-up truck and a portion of the airport perimeter fence. The aircraft contacted the water in a flat attitude and on a second impact water entered the cabin almost immediately. Only a few seconds passed between bird impact and water contact and it is estimated that the aircraft did not attain more than 75 to 100 feet in altitude. After the second impact the pilot went to the rear of the aircraft to release the emergency exit and see if the stewardess was uninjured. The airplane settling in the water apparently exerted some pressure inside and it was impossible to open the right cabin emergency exit. One pilot succeeded in opening the pilot's left window with the fire extinguisher. The other pilot opened the left cabin exit. A small private boat picked up the crew as the aircraft was settling in the water. Approximately the nose cone area remained above the water level. The crew returned

to the airport and there were no injuries. The aircraft floated approximately 5 to 10 minutes. No bird dispersing method or system of any kind exists at the airport.

In conclusion, the advisory comment "birds on end of runway", "bird activity" is a caution remark and denoted no extreme hazard to the crew. It has been given routinely to hundreds of departing pilots at Lakefront. The mass of birds that must have been on the runway that would allow an aircraft to strike 314 birds to me denotes an extreme hazard. When an aircraft is cleared to takeoff, the pilot has every right to assume that there are no other aircraft on the runway, that there are no people on that runway or that there are not one thousand birds on the runway. In my estimation the runway should have been closed for departing jet traffic. With that many birds, the runway could never have been considered safe. It would have been helpful if some official survival assistance could have been available from the airport. The Coast Guard apparenty does not have direct contact with the tower and it was sometime before they arrived at the submerged aircraft.

/s/ W. P. FLOWER
W. P. Flower

/s/ CHARLES E. DIRCK
C. Dirck

Official accident investigators later counted 314 dead seagulls on the runway (A. 19). They also determined that the aircraft impacted the water at a point located one-fifth of a statute mile from the cyclone fence which marked the airport boundary (A. 21, 22). The waters of Lake Erie are navigable at that point, their depth being estimated at "between 40 and 45 feet" (A. 23). The Falcon sank completely and remained submerged

in Lake Erie for more than two days (A. 23, 25). After it was raised an inspection of the aircraft revealed that, among other things, "the fuselage contained severe bending" (A. 27), and the interior of the aircraft (including all electrical components, radios and instruments) "revealed intensive water soaking" (A. 28).[3]

This action was brought within the admiralty and maritime jurisdiction of the United States District Court for the Northern District of Ohio, Eastern Division, by EJA against the City and respondent Dicken[4] to recover for the total destruction of EJA's Falcon, for the loss of use of the aircraft for a period reasonably required to obtain a replacement, and for the salvage, raising and other costs incurred (A. 2, 4). The complaint seeks damages in the amount of $1,763,643.64 (with interest), and contains the following allegations, among others:

> 7. On or about July 28, 1968, defendant Howard E. Dicken negligently and carelessly supervised and controlled, or failed to supervise and control, plaintiffs' Falcon; and negligently and carelessly failed to warn plaintiffs of hazards to aircraft existing on, over and adjacent to the airport of which defendant Howard E. Dicken knew or

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[3] Photographs of the dead birds, the impact point, the cyclone fence and truck struck by the Falcon, the damage to the Falcon and similar matters are shown in the Appendix of Photograph Exhibits.

[4] EJA also filed an action against Dicken's employer, the United States of America, under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680. That action, identical to the present action against Dicken except for the jurisdictional basis, is still pending in the United States District Court for the Northern District of Ohio, Eastern Division, as Civil Action No. C69-352.

should have known, including a huge flock of seagulls which were sitting on the active runway.

8. On and before July 28, 1968, the city and defendant Phillip A. Schwenz, and each of them, negligently and carelessly operated, controlled, maintained, supervised and inspected the airport; negligently and carelessly failed to remove and eliminate hazards to the aircraft existing on, over and adjacent to the airport, including the aforementioned flock of seagulls; and negligently failed to warn plaintiffs of hazards to aircraft existing on, over and adjacent to the airport of which the city and defendant Phillip A. Schwenz knew or should have known, including the aforementioned flock of seagulls.

9. As a result of the aforementioned negligence and carelessness of defendants, and each of them, plaintiffs' Falcon struck several hundred seagulls shortly after take off from the airport when the flock flushed; and *the Falcon was totally destroyed when it crashed and sank into the navigable waters of Lake Erie* off shore from the airport, all to plaintiffs' damage. . . . (A. 3, 4, emphasis added.)

The City impleaded the United States of America seeking non-contractual indemnity (R. 14-17). After all pleadings were at issue (R. 9, 6) and following some initial discovery (A. 18-35), the City filed a motion pursuant to Rule 12(h)(3) Fed. R. Civ. P. suggesting to the district court that it lacked jurisdiction of the subject matter (R. 21). Dicken joined in the motion (R. 24). On June 12, 1970, the district court granted the City's motion and filed a memorandum and order dismissing EJA's complaint for lack of jurisdiction over the subject matter (R. 73-87). Relying on three Sixth Circuit cases, *Wiper* v. *Great*

Lakes Engineering Works, 340 F.2d 727 (6th Cir.), *cert. denied,* 382 U.S. 812 (1965); *Chapman* v. *City of Grosse Pointe Farms,* 385 F.2d 962 (6th Cir. 1967); and *Gowdy* v. *United States,* 412 F.2d 525 (6th Cir.), *cert. denied,* 396 U.S. 960 (1969), the district court held (1) that the locality of the tort was over land because "the 'impact' of the alleged negligence occurred when the gulls disabled the plane's engines" (Pet. for Cert., App. B, pp. 36a-37a); and (2) that there was "no relationship between the 'wrong' alleged in this case and some maritime service, navigation or commerce upon navigable waters" (Pet. for Cert., App. B, p. 41a).

EJA appealed the dismissal to the Sixth Circuit under 28 U.S.C. § 1291. By a vote of two-to-one the court of appeals affirmed the judgment below. Chief Judge Phillips, writing for the majority, agreed with the district court's holding that "the alleged tort occurred on land, even though the plane fell into navigable waters . . ." (Pet. for Cert., App. A, p. 1a); but found it "not necessary to consider the question of maritime relationship or nexus . . ." (Pet. for Cert., App. A, p. 6a). Chief Judge Phillips did not rely on the three Sixth Circuit cases cited by the district court. Instead, he felt this case was controlled by three cases from this Court: *Smith & Son, Inc.* v. *Taylor,* 276 U.S. 179 (1928); *Minnie* v. *Port Huron Terminal Co.,* 295 U.S. 647 (1935); and *The Admiral Peoples,* 295 U.S. 649 (1935).

In a seventeen page dissent Circuit Judge Edwards disagreed. He noted that in *Weinstein* v. *Eastern Airlines, Inc.,* 316 F.2d 758 (3d Cir.), *cert. denied,* 375 U.S. 940 (1963), the Third Circuit held that the federal courts have maritime jurisdiction over airplane

crashes in navigable waters where the cause of the crash was alleged to be tortious conduct which occurred on land. He agreed with the Third Circuit's reasoning in *Weinstein* that such cases are within the admiralty jurisdiction because "When an aircraft crashes into navigable waters, the dangers to persons and property are much the same as those arising out of the sinking of a ship or a collision between two vessels (*Id.* at 763). He felt that this case required the Sixth Circuit to accept or reject *Weinstein,* and concluded that in his view it "should adopt the Third Circuit rule of *Weinstein, supra*" (Pet. for Cert., App. A, p. 25a). In a separate concurring opinion Circuit Judge McCree agreed "as a matter of policy, with much of what Judge Edwards has written in support of the view that 'air ships . . . are within the maritime jurisdiction when they crash on navigable waters' " (Pet. for Cert., App. A, p. 8a). However, he concluded that the question was "foreclosed" by this Court's opinions in the cases cited by Chief Judge Phillips. He therefore joined in affirming the district court.

SUMMARY OF ARGUMENT

Two facts are not in dispute in this case: (1) EJA's aircraft crashed into navigable waters, and (2) it was totally destroyed when it crashed and sank in those navigable waters. Despite these two facts the court below dismissed EJA's admiralty claim for lack of subject matter jurisdiction, finding that the tort occurred over land because EJA's aircraft first became "disabled" over land. "The rule," the court of appeals wrote, "is that the situs of the tort is where the negligence becomes operative, not where the damages

or the major portion of them are sustained." (Pet. for Cert., App. A, p. 7a) The court below thought that this case was "controlled" by three cases from this Court: two longshoremen's compensation cases dated 1928 and 1935, *Smith & Son, Inc.* v. *Taylor,* 276 U.S. 179 (1928), and *Minnie* v. *Port Huron Terminal Co.,* 295 U.S. 647 (1935); and one gangplank slip-and-fall case dated 1935, *The Admiral Peoples,* 295 U.S. 649 (1935). It also stated that its ruling did not conflict with the Third Circuit's decision in *Weinstein* v. *Eastern Airlines, Inc.,* 316 F.2d 758 (3d Cir.), *cert. denied,* 375 U.S. 940 (1963).

The court of appeals erred in dismissing EJA's complaint for lack of admiralty jurisdiction. It failed properly to apply the "locality rule" for maritime tort jurisdiction first announced in *The Plymouth,* 70 U.S. (3 Wall.) 20 (1866), which rule has been "constantly reiterated" by this Court for over a century. *Victory Carriers, Inc.* v. *Law,* — U.S. —, 30 L.Ed. 2d 383 (1971). In *Victory Carriers* this Court said, "The historic view of this Court has been that maritime jurisdiction of the federal courts is determined by the locality of the accident and that maritime law governs only those torts occurring on navigable waters of the United States." In *The Plymouth* this Court said that a tort "occurred" on land if the "injury complained of" was not complete on navigable waters. Conversely, in this case the "injury complained of"—the total destruction of EJA's aircraft—was not complete over land and the tort therefore did not occur there.

Furthermore, this case cannot be "reconciled" with the *Weinstein* holding. In *Weinstein* the Third Cir-

cuit, faced with a fact situation nearly identical to the present case, adopted a different rule—"that tort claims arising out of the crash of a land-based aircraft on navigable waters within the territorial jurisdiction of a state are cognizable in admiralty." 316 F.2d at 766. The *Weinstein* cases arose out of the crash of an aircraft into Boston Harbor. There, as here, the aircraft crashed in navigable waters shortly after takeoff because it became "crippled" over land when birds were ingested into its jet-powered engines. The *Weinstein* rule, which has been accepted for the last thirty years in *all* cases of aircraft crashing into, on or over navigable waters—either territorial or beyond one marine league from the shore—is in direct and irreconcilable conflict with the Sixth Circuit's rule pronounced in this case.

The court of appeals' view that this aviation admiralty case is "controlled" by longshoremen's compensation cases pre-dating the Longshoremen's Act is erroneous, unsound and unworkable in practical application to aviation and space activities. *Smith & Son, Inc.* v. *Taylor,* 276 U.S. 179 (1928), a case heavily-relied upon by respondents and the court below, is of questionable vitality today even in its own field—maritime personal injury litigation brought by longshorement and harbor workers—and is not applicable to this case. Cases under the Longshoremen's Act, which became effective after *Smith & Son,* and the revolutionary changes surrounding harbor workers' remedies against shipowners for unseaworthiness both seaward and landward of the Jensen line, have made the "refined distinctions" of the cases relied upon by the court of appeals "of historic and academic interest

only." *Pure Oil Co.* v. *Snipes,* 293 F.2d 60 (5th Cir. 1961).

The *Weinstein* rule, which focuses on the locality of the crash, is the only workable rule for future aviation and space cases. The reason behind the *Weinstein* rule has been stated thus: "When an aircraft crashes into navigable waters, the dangers to persons and property are much the same as those arising out of the sinking of a ship or a collision between two vessels." *Weinstein* v. *Eastern Airlines, Inc.,* 316 F.2d at 763. To this statement the Circuit Judge dissenting in this case has added, "Problems posed for aircraft landing on, crashing on, or sinking into navigable waters differ markedly from landings on land. . . . In such instances, wind and wave and water, the normal problems of the mariner, become the approach or survival problems of the pilot and his passengers" (Pet. for Cer., App. A, p. 24a). The lower courts have noted that the aircraft cases present special problems, and the *Weinstein* rule adopts a practical approach in the solution of those problems. Injecting an outdated and amorphous test from aberrant longshoremen's compensation cases into the area of aviation and space admiralty cases will spawn litigation, create unnecessary complexities and engage the courts in metaphysical exercises to determine where "the substance and consummation of the occurrence which gave rise to the cause of action took place." With aircraft and spacecraft circling the globe at ever higher speeds and altitudes, such a rule has no virtues to recommend its use in cases of aircraft crashing in navigable waters. For these reasons the court below should be reversed and this Court should pronounce the following rule:

When an aircraft crashes in navigable waters tort claims arising out of the accident are within admiralty and maritime jurisdiction.

In finding that this case is within the admiralty and maritime jurisdiction this Court need not enter into any extended discussion concerning a "locality plus" rule. It will be sufficient here to adopt the following language from this Court's opinion in *Atlantic Transport* v. *Imbrovek*, 234 U.S. 52, 62 (1914): "If more is required than the locality of the wrong in order to give the court jurisdiction, the relation of the wrong to maritime service, to navigation, and to commerce on navigable waters, was quite sufficient." The reason for this was stated by the Third Circuit in *Weinstein* and concurred in by the dissenting Judge in this case: "At the time the Constitution was framed and for a century and a half thereafter, ships of various kinds were the only means of transportation and commerce on or across navigable waters. Today, aircraft have become a major instrument of travel and commerce over and across the same waters." 316 F.2d at 763. To this the dissenting Judge in this case has added, ". . . [w]e should note that there is some maritime character to any flight of any airplane over any navigable water." (Pet. for Cert., App A, p. 25a)

For all these reasons the court of appeals should be reversed; EJA's claim held to be within the admiralty and maritime jurisdiction; and the case remanded to the district court for trial.

ARGUMENT

I

WHEN AN AIRCRAFT CRASHES IN NAVIGABLE WATERS TORT CLAIMS ARISING OUT OF THE ACCIDENT ARE WITHIN ADMIRALTY AND MARITIME JURISDICTION

EJA's complaint in this case alleges that its "Falcon was totally destroyed when it crashed and sank in the navigable waters of Lake Erie off shore from the airport. . . ." (A. 4). In dismissing this complaint for lack of subject matter jurisdiction both the district court and the court of appeals admitted that two facts were beyond question in this case:[5]

1. *EJA's aircraft crashed into navigable waters,* and

2. *It was totally destroyed when it crashed and sank in those navigable waters.*

Both courts reasoned that this case was not within the jurisdiction of admiralty because EJA's aircraft first became "disabled" over land; therefore, the "tort . . . occurred on land before the aircraft reached Lake Erie . . ." (Pet. for Cert., App. A, p. 6a). The legal test used by the court of appeals in reaching this conclusion

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[5] The district court admitted that "In ruling on a motion to dismiss for lack of jurisdiction over the subject matter, the allegations of the complaint must be construed most strongly in favor of the plaintiff" (Pet. for Cert., App. B, p. 28a). Furthermore, the district court assumed EJA's "position that the damage to the plane from contact with the birds, fence and truck was minimal compared to the total destruction of the aircraft when it 'crashed and sank in the navigable waters of Lake Erie' " (Pet. for Cert., App. B, p. 31a). The court of appeals also admitted that EJA's "plane fell into navigable waters" and that "the aircraft was alleged to be a total loss as a result of the soaking in the waters of Lake Erie" (Pet. for Cert., App. A, pp. 1a-2a).

is stated by Circuit Judge McCree in his concurring opinion. He said:

> The rule, as I understand it, is that the situs of the tort is where the negligence becomes operative, *not where the damages, or the major portion of them, are sustained* (Pet. for Cert., App. A, p. 7a, emphasis added).

A review of this Court's decisions concerning maritime tort jurisdiction and the many cases decided by the lower courts holding that tort claims arising out of the crash of an aircraft in navigable waters are cognizable in admiralty, show beyond any real doubt that the court of appeals' decision in this case is clearly erroneous and must be reversed.

A. The Historic View of This Court Has Been That the Maritime Tort Jurisdiction of the Federal Courts Is Determined by the Locality of the Accident.

The constitutional grant of power to the courts of the United States to administer the general maritime law is found in Article III, Section 2, which extends the judicial power "to all cases of admiralty and maritime Jurisdiction." This grant has been implemented by Congress in 28 U.S.C. § 1333. That statute gives to the district courts original jurisdiction of "Any civil case of admiralty or maritime jurisdiction." Mr. Justice Story was the first to struggle with the historic question of what cases were included in the grant. In the leading case of *DeLovio* v. *Boit*, 7 F.Cas. 418, 444 (No. 3776) (C.C.D. Mass. 1815), he said that admiralty jurisdiction "comprehends all maritime contracts, torts, and injuries. The latter branch is necessarily bounded by locality; the former extends over all contracts, (wheresover they may be executed, or whatsoever may

be the form of the stipulations,) which relate to the navigation, business or commerce of the sea."[6] Two years earlier, in *Thomas* v. *Lane,* 23 F.Cas. 957, 960 (No. 13,902) (C.C.D. Me. 1813), Mr. Justice Story had said, "In regard to torts I have always understood, that the jurisdiction of the admiralty is exclusively dependent upon the locality of the act. The admiralty has not, and never (I believe) deliberately claimed to have any jurisdiction over torts, except such as are maritime torts, that is, such as are committed on the high seas, or on waters within the ebb and flow of the tide." Later, this test substituted navigable waters, including the Great Lakes, for tide waters in American admiralty law. *The Genesee Chief* v. *Fitzhugh,* 53 U.S. (12 How.) 443 (1851). Mr. Justice Story also stated the reason why, in admiralty jurisdiction, tort cases are "dependent upon locality." In his Commentaries on the Constitution he said:

> . . . [T]his class of cases has, or may have, an intimate relation to the rights and duties of foreigners in navigation and maritime commerce. It may materially affect our intercourse with foreign states, and raise many questions of international law, not merely touching private claims, but national sovereignty and national reciprocity. Thus, for instance, if a collision should take place at sea between an American and foreign ship, many important questions of public law might be connected with its just decision; for it is obvious that it could not be governed by the mere municipal law of either country. . . . And in other cases of salvage, the doctrines of international and maritime law come into full activity, rather than those of any mere municipal code. (*a*) There is, therefore, a

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[6] *DeLovio* v. *Boit* was followed by this Court in *Insurance Co.* v. *Dunham,* 78 U.S. (11 Wall.) 1 (1871).

> peculiar fitness in appropriating this class of cases to the national tribunals; since they will be more likely to be there decided upon large and comprehensive principles, and to receive a more uniform adjudication; and thus to become more satisfactory to foreigners. (2 Story on the Const. § 1670 (5th ed. 1891).)

When is a tort "located" on navigable waters? This question was first answered by this Court in 1866 in the landmark case of *The Plymouth*, 70 U.S. (3 Wall.) 20 (1866) The rule stated there has "been constantly reiterated" by this Court in the century since that decision. *Victory Carriers, Inc.* v. *Law*, — U.S. —, 30 L.Ed.2d 383, 387 (1971). In *The Plymouth* negligence committed on board a ship tied up to a wharf in Chicago caused a fire on board ship which spread to the wharf and surrounding buildings. A libel was filed against the owners of the vessel to recover for the damage done to the wharf and buildings. This Court held that the tort involved was not a maritime tort and the case not cognizable in admiralty. It said:

> It will be observed, that the entire damage complained of by the libelants, as proceeding from the negligence of the master and crew, and for which the owners of the vessel are sought to be charged, occurred, not on the water, but on the land. The origin of the wrong was on the water, but the substance and consummation of the injury on land. It is admitted by all the authorities, that the jurisdiction of the admiralty over maritime torts depends upon locality—the high seas, or other navigable waters within admiralty cognizance; . . .
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> * * *
>
> But it has been strongly argued that this is a mixed case, the tort having been committed partly on water and partly on land; and that the origin

of the wrong was on the water, in other words, as the wrong began on the water (where the admiralty possessed jurisdiction), it should draw after it all the consequences resulting from the act. These mixed cases, however, will be found, not cases of tort, but of contract. . . . The cases of tort . . . are cases of personal wrongs, which commenced on the land; such as improperly enticing a minor on board a ship and there exercising unlawful authority over him. The substance and consummation of the wrong were on board the vessel—on the high seas, or navigable waters—*and the injury complete within admiralty cognizance.* It was the tortious acts on board the vessel to which the jurisdiction attached.

This class of cases may well be referred to as illustrating the true meaning of the rule of locality in cases of marine torts, namely: *that the wrong and injury complained of must have been committed wholly upon the high seas of navigable waters, or, at least, the substance and consummation of the same must have taken place upon these waters to to be within the admiralty jurisdiction.* In other words, *the cause of damage,* in technical language, whatever else attended it, *must have been there complete.*

Much stress has been given to the fact . . . that the vessel which communicated the fire to the wharf and building, was a maritime instrument or agent, and hence, characterized the nature of the tort. . . . The jurisdiction of the admiralty over maritime torts does not depend upon the wrong having been committed on board the vessel, but upon its having been committed upon the high seas or other navigable water. . . *Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance.* (70 U.S. (3 Wall.) at pp. 33-36)

The above-quoted language shows beyond question that the court of appeals did not apply the correct legal test in this case in determining the locality of the tort. There has never been any dispute in this case that the "injury complained of" was not complete on land. As Circuit Judge Edwards correctly pointed out in his well-reasoned and scholarly dissent:

> . . . The damage complained of is damage occasioned by crashing into and sinking into navigable waters.[4]

[4] I attach no significance to the fact that the descending plane struck the top of a truck and the perimeter fence of the airport before crashing into Lake Erie. *This record makes clear that the impact on the water and the sinking of the plane with its consequent water damage accomplished the destruction complained of.* (Pet. for Cert., App. A, p. 25a, emphasis added).

It is true that in 1948 Congress gave plaintiffs in "ship-to-shore" tort cases a remedy in admiralty against the vessel or the shipowner with the passage of the Admiralty Extension Act.[7] It is also true that the "rule of locality in cases of marine torts" laid down in *The Plymouth* has been "constantly reiterated" by this Court. See, *e.g., The Philadelphia, Wilmington and Baltimore R.R. Co.* v. *The Philadelphia & Havre de Grace Steam Towboat Co.*, 64 U.S. (23 How.) 209, 215 (1860); *Insurance Co.* v. *Dunham*, 78 U.S. (11 Wall.) 1, 25 (1871); *Cleveland Terminal & Valley R.R. Co.* v. *Cleveland S.S. Co.*, 208 U.S. 316, 319 (1908); *Atlantic*

[7] The Extension of Admiralty Jurisdiction Act, 46 U.S.C. § 740, provides in part:

> The Admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

Transport Co. v. *Imbrovek,* 234 U.S. 52, 59-60 (1914); *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U.S. 469, 476 (1922); *State Industrial Commission* v. *Nordenholt Corp.,* 259 U.S. 263, 273 (1922); *London Guarantee & Accident Co.* v. *Industrial Accident Commission of the State of California,* 279 U.S. 109, 123-124 (1929); *Hess* v. *United States,* 361 U.S. 314, 318 (1960); *Nacirema Operating Co.* v. *Johnson,* 396 U.S. 212, 215, n. 7 (1969); *Victory Carriers, Inc.* v. *Law,* — U.S. —, 30 L.Ed.2d 383, 387 (1971). In the *Hess* case a carpenter foreman drowned in the navigable waters of the Columbia River while working on the Bonneville Dam when a tug and barge he was on capsized because the spillway gates had been left open. This Court said:

> The petitioner argues that "the place where the act or omission occurred" was on the dam itself, an extension of the land, and that, therefore, this case should be decided in accordance with the law that Oregon would apply to torts occurring on land. It is clear, however, that the term "place" in the Federal Torts Claims Act means the political entity, in this case Oregon, whose laws shall govern the action against the United States "in the same manner and to the same extent as a private individual under like circumstances." 28 USC § 2674. There can be no question but that Oregon would be required to apply maritime law if this were an action between private parties *since a tort action for injury or death occurring upon navigable waters is within the exclusive reach of maritime law.* The Plymouth (Hough v. Western Transp. Co.) (US) 3 Wall 20, 35, 36, 18 L ed 125, 128. (361 U.S. at 318, n. 7, emphasis added).

And in *Victory Carriers Inc.* v. *Law* this Court recently said:

> The historic view of this Court has been that the maritime tort jurisdiction of the federal courts is

> determined by the *locality of the accident* and that maritime law governs only those torts occurring on navigable waters of the United States. (30 L. Ed.2d at 387, emphasis added.)

It seems beyond dispute that the "locality of the accident" in this case is where the aircraft crashed—on the navigable waters of Lake Erie. Thus, the court of appeals' view that "the situs of the tort is where the negligence becomes operative, not where the damages, or the major portion of them, are sustained."[8] is clearly erroneous; and its decision based upon the application of this erroneous rule—that "the tort in this case occurred on land"—[9] must be reversed.

B. The Court of Appeals Decision in This Case Is in Direct and Irreconcilable Conflict With the Third Circuit's Decision in Weinstein and Contrary to Every Reported Decision Concerning Aircraft Crashes in Navigable Waters.

As Circuit Judge Edwards pointed out in his dissenting opinion, there are no decisions from this Court concerning tort claims arising out of aircraft crashes in navigable waters, but there are many lower court cases which have considered the question whether such claims are cognizable in admiralty. The court of appeals holding in this case not only stands alone against *all* such reported decisions, it is in direct and irreconcilable conflict with the leading Circuit Court of Appeals case in this area, *Weinstein* v. *Eastern Airlines, Inc.*, 316 F.2d 758 (3d Cir.), *cert. denied*, 375 U.S. 940 (1963), a case which has been followed many times and which is nearly identical in its facts to the present case. A review of these aviation cases illustrates the correct-

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[8] Pet. for Cert., App. A, p. 7a.

[9] Id. at 6a.

ness of the rule they espouse—that when an aircraft crashes in navigable waters tort claims arising out of the accident are cognizable in admiralty—because, in the words of Chief Judge Biggs, "Concepts of admiralty tort jurisdiction should not and cannot remain static and unchanging." *Weinstein* v. *Eastern Airlines, Inc.*, 316 F.2d at 763. These cases also show that the holding of the court of appeals in this case is such a departure from all prior authority and is in such irreconcilable conflict with the Third Circuit's rule on this same matter of federal law as to call for the exercise of this Court's power "to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United States, and to exercise supervisory power over lower federal courts." [10] That power should be exercised to reverse the court below.

The first reported case to come before a lower court involving the crash of an aircraft in navigable waters is *Choy* v. *Pan American Airways Co.*, 1941 A.M.C. 483 (S.D.N.Y. 1941). The action there was for the death of a passenger in a seaplane which had crashed crossing the Pacific Ocean The court had to decide whether the plaintiff had a claim under the Death on the High Seas Act, 46 U.S.C. § 761, a statute passed by Congress in 1920 before the advent of commercial aviation. That statute provides:

> § 761. *Right of action; where and by whom brought.*
>
> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on

[10] Address of Chief Justice Vinson before American Bar Association, September 7, 1949, 69 S.Ct. v, vi.

> the high seas beyond a maritime league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person or corporation which would have been liable if death had not ensued.

The district court found that the statute was broad enough to give the plaintiff a claim. It said there was no reason why the phrase "on the high seas" should make the law operable "only on a horizontal plane." 1941 A.M.C. at 484. The court rejected the contention that § 177 of the Air Commerce Act of 1926, 49 U.S.C. § 171, the predecessor of § 1509(a) of the Federal Aviation Act of 1958, 49 U.S.C. § 1301, precluded such a finding.[11]

In 1943 a New York State court reached the same conclusion in a case involving the disappearance without a trace of an aircraft in the South Pacific. *Wyman and Bartlett* v. *Pan-American Airways, Inc.*, 45 N.Y.S.2d 420 (1943), *aff'd*, 48 N.Y.S.2d 458, *leave denied*, 49 N.Y.S.2d 271, *cert. denied*, 324 U.S. 882 (1944). In 1951 a district court found the statute applicable in a case involving the crash of a light aircraft in Massachusetts Bay more than one marine league from Boston where the crash was allegedly caused by negligent failure to inspect the

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[11] It will be noted that the City makes the same argument in this case, thirty-one years later. See City's Brief opposing Certiorari, p. 13; Reply Brief for Petitioners, pp. 14, 15. 49 U.S.C. § 1509(a) provides that "the navigation and shipping laws of the United States . . . shall not be construed to apply to seaplanes or other aircraft. . . ."

aircraft while it was on land, notwithstanding the phrase "Whenever the death of a person shall be caused by wrongful act, neglect or default occurring on the high seas . . ." *Lacey* v. *L. W. Wiggins Airways, Inc.*, 95 F. Supp. 916 (D. Mass. 1951). The court concluded that "when the statute speaks of 'wrongful act, neglect, or default occurring on the high seas,' it contemplates the substance of the occurrence which resulted in death and gave rise to a right to recover." *Id.* at 918, emphasis in the original. It said that the substance of the occurrence was not merely the act or failure to act while the aircraft was on land; but that "the effect of such failure was not spent *until the plane fell to the sea.*" *Id.* at 918, emphasis added. The court concluded, "This is a maritime tort, and upon it the libellant's claim rests." *Id.* at 918.

The leading death case holding that the crash of an aircraft at sea gives rise to a maritime tort cognizable only in admiralty under the Death on the High Seas Act is *Wilson* v. *Transocean Airlines,* 121 F. Supp. 85 (N.D. Calif. 1954). In a scholarly and often-cited opinion Judge Goodman came to grips with the question of aircraft crashes in admiralty waters. It was argued in the case that the statute had "no application to deaths resulting from the operation of aircraft *over* the high seas. *Id.* at 91, emphasis in the original. At the outset Judge Goodman noted:

> At the beginning of the development of aviation in the United States there was a considerable body of opinion that the entire ocean of air surrounding the earth is within the admiralty jurisdiction, and that consequently all air flight is within the admiralty and maritime jurisdiction of the federal government. This theory never received general acceptance and the federal legisla-

> tion regulating air navigation has been based on the Commerce Clause of the Constitution. However, the question whether the airspace over the seas is within the jurisdiction of admiralty has received little attention and remains an open one. See Knauth, "Aviation and Admiralty," 6 Air Law Review 226 (1935); Veeder, "The Legal Relation between Aviation and Admiralty," 2 Air Law Review 29 (1931); Report of the Special Committee on the Law of Aviation of the American Bar Association, 46 American Bar Association Reports 77-97, 498-530 (1921); Bogert, "Problems in Aviation Law," 6 Cornell Law Quarterly 271, 303-305 (1921). In 1952, the Congress expressly declared by statute that any aircraft, belonging to the United States or to any United States citizen or corporation, while in flight above the high seas is within the maritime jurisdiction of the United States for the purposes of the criminal statutes. 66 Stat. 589, 18 U.S.C. 7. (121 F. Supp. at 91, n. 23).[12]

He then stated the locality test as pronounced in *The Plymouth,* and went on to say:

> In applying the "locality" test for admiralty jurisdiction, the tort is deemed to occur, not where the wrongful act or omission has its inception, but where the impact of the act or omission produces such injury as to give rise to a cause of action. In so far as appears from the complaint in this action, the wrongful act charged to defendant produced no actionable injury *until the aircraft plunged into the sea.* The tort occurred upon the high seas within the admiralty jurisdiction. (121 F. Supp. at 92, emphasis added).

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[12] In his dissenting opinion in this case Judge Edwards also thought 18 U.S.C. § 7(5) indicated that "Congress has recognized maritime jurisdiction over aircraft flying over, resting upon, or crashing into navigable waters." (Pet. for Cert., App. A, p. 12a).

As in *Choy,* it was argued that § 7 of the Air Commerce Act, 49 U.S.C. § 177, removed deaths resulting from airplane crashes from the ambit of the Death on the High Seas Act. In rejecting this argument Judge Goodman stated:

> ... The purpose of the Air Commerce Act of 1926 was to foster civil aviation by establishing federal aids to navigation and federal safety regulations. The Act authorized regulations for the examination, rating, and registration of aircraft and airmen, and air traffic rules for the navigation, protection, and identification of aircraft. Section 7 was intended to prevent any conflict between the existing federal regulations respecting the navigation of vessels and those to be promulgated respecting the navigation of aircraft. The term "navigation and shipping laws" as used in Section 7 of the Act obviously refers to those federal laws specifically governing the navigation and operation of the merchant marine. The term was never intended to include a general admiralty statute such as the Death on the High Seas Act. (121 F. Supp. at 93).

Since Judge Goodman's opinion in *Wilson* every court faced with a case involving the crash of an aircraft into navigable waters more than one marine league from the shore has held that the torts arising from the crash are maritime torts cognizable in admiralty, and that death claims arising therefrom come under the Death on the High Seas Act, notwithstanding the fact that the acts or omissions allegedly causing the crash occurred on land. *E.g., Noel* v. *Airponents, Inc.,* 169 F. Supp. 348 (D.N.J. 1958) (Venezuelan airliner "burned, exploded, went out of control and crashed into the sea" thirty miles off New Jersey coast allegedly as a result of tortious acts committed

within the territorial limits of the State of New York); *Fernandez* v. *Linea Aeropostal Venezolana,* 156 F. Supp. 94 (S.D.N.Y. 1957) (same crash as *Noel*); *Trihey* v. *Transocean Air Lines, Inc.,* 255 F. 2d 824 (9th Cir.), *cert. denied,* 358 U.S. 838 (1958) (airliner crashed in Pacific Ocean allegedly as a result of improper maintenance practices on land); *National Airlines, Inc.* v. *Stiles,* 268 F. 2d 400 (5th Cir.), *cert. denied,* 361 U.S. 885 (1959) (airliner crashed in Gulf of Mexico during storm allegedly as a result of failure to provide pilot with proper weather information on land); *Guess* v. *Read,* 290 F. 2d 622 (5th Cir. 1961), *cert. denied,* 368 U.S. 957 (1962) (helicopter crashed in Gulf of Mexico after leaving drilling barge allegedly as a result of defective manufacture and "unairworthiness"); *Montgomery* v. *Goodyear Aircraft Corp.,* 392 F. 2d 777 (2d Cir.), *cert. denied,* 393 U.S. 841 (1968) (Navy airship crashed off coast of New Jersey killing 18 crewmen allegedly as a result of defective manufacture); *Noel* v. *United Aircraft Corp.,* 342 F. 2d 232 (3d Cir. 1964) (same crash as *Noel* and *Fernandez, supra*); *Krause* v. *Sud-Aviation,* 413 F. 2d 428 (2d Cir. 1969) (helicopter crashed in Gulf of Mexico as a result of defective manufacture in France); *Kropp* v. *Douglas Aircraft Co.,* 329 F. Supp. 447 (E.D. N.Y. 1971) (death of crew member of Navy jet bomber who fell out of aircraft over high seas. ". . . [W]hether the tort is deemed to have occurred in the airspace over the high seas (i.e., at the moment when the decedent exited the plane) or on the high seas (i.e., at the point of impact with the water), the exercise by this court of admiralty jurisdiction is clearly warranted." 329 F. Supp. at 455). In those cases where an aircraft crashed in navigable waters beyond one marine league from the shore and

resulted in personal injuries to the occupants of the plane rather than death, the courts have held that the personal injury claims are maritime torts within the jurisdiction of admiralty. *E.g., Horton* v. *J & J Aircraft, Inc.,* 257 F. Supp. 120 (S.D. Fla. 1966); *Bergeron* v. *Aero Associates, Inc.,* 213 F. Supp. 936 (E.D. La. 1963).

Throughout this litigation the City and Dicken have argued that all of the above authority should be disregarded because the Death on the High Seas Act is not applicable to this case, the crash having occurred on territorial navigable waters and no one having been killed. In answer it would be enough to say, as Chief Judge Biggs said in *Weinstein* v. *Eastern Airlines, Inc.,* 316 F. 2d 758, 763, "An apt analogy to the situation at bar can be drawn, we conclude, from the cases construing the Federal Death on the High Seas Act. . . ." See also Judge Edwards' dissenting opinion in this case, Pet. for Cert., App. A, pp. 12a, 13a. But EJA is not limited to arguing by analogy in this case, for there are also reported cases involving aircraft crashes into territorial navigable waters where the causes are alleged to be tortious conduct occurring on land. In these cases, as in the death and personal injury cases occurring on the high seas, the courts have concluded that the torts arising out of such crashes are maritime torts cognizable in admiralty. *E.g., Weinstein* v. *Eastern Airlines, Inc.,* 316 F. 2d 758 (3d Cir.), *cert. denied,* 375 U.S. 940 (1963); *Scott* v. *Eastern Airlines, Inc.,* 399 F. 2d 14 (3d Cir.), *cert. denied,* 393 U.S. 979 (1968) (same crash as *Weinstein;* Third Circuit sitting in bank affirms *Weinstein* holding of admiralty jurisdiction); *Hornsby* v. *The Fishmeal Co.,* 431 F. 2d 865 (5th Cir. 1970) (mid-air collision be-

tween two light aircraft which crashed in the Gulf of Mexico within one marine league of the Louisiana shore resulting in the deaths of both pilots. Fifth Circuit held both plaintiffs had causes of action for wrongful death in admiralty under the general maritime law after this Court's decision in *Morgane* v. *States Marine Lines,* 398 U.S. 375 (1970). Property damage claim for the value of the aircraft also a maritime tort. See district court's opinion, 285 F. Supp. 990 at 991 (W.D. La. 1968)); *Harris* v. *United Airlines,* 275 F. Supp. 431 (S.D. Iowa 1967) (Boeing 727 jet "fortuitously" crashed into the navigable waters of Lake Michigan within the territorial boundaries of the State of Illinois. The court said, "The weight of authority is that locality alone determines whether or not a tort claim is within admiralty jurisdiction. See *Weinstein* v. *Eastern Airlines, Inc.,* 316 F. 2d 758 (3d Cir. 1963). While several of the alleged acts of negligence in this case would necessarily have been committed on land, *the effects of the alleged negligence occurred on navigable waters.* No more is required to invoke the admiralty jurisdiction of this court and call for the application of maritime principles." 275 F. Supp. at 432, emphasis added.)

The leading case holding that tort claims arising out of aircraft crashes on territorial navigable waters is *Weinstein,* 316 F. 2d 758. The district court in this case did not try to distinguish *Weinstein.* It simply concluded that it was bound by the Sixth Circuit's "minority position which requires some maritime nexus," rather than by the Third Circuit's rule (Pet. for Cert., App. B, p. 33a). See *Chapman* v. *City of Grosse Pointe Farms,* 385 F.2d 962 (6th Cir. 1967)

and *Gowdy* v. *United States,* 412 F.2d 525 (6th Cir.), *cert. denied,* 396 U.S. 960 (1969). The court of appeals realized that if it found that the alleged tort occurred over land there was no need to consider the question of maritime nexus. That realization, however, left the court of appeals face to face with the *Weinstein* decision. It resolved the dilemma by "reconciling" the present case with *Weinstein* in the following manner:

> As we read that decision [*Weinstein*], the test for admiralty jurisdiction over torts stated at 316 F.2d at 761 *produces the same result we have reached when applied to the facts of the present case.* (Pet. for Cert., App. A, p. 6a, emphasis added).

EJA respectfully submits that the above-quoted statement is erroneous and cannot withstand analysis; and that Judge Edwards' conclusion "that the facts of this case require us to accept or reject *Weinstein*" is the only correct view of this case (Pet. for Cert., App. A, p. 11a).

The court of appeals reasoned that this case could be reconciled with *Weinstein* because the tort in this case occurred over land when EJA's Falcon hit the seagulls and its engines became crippled; while in *Weinstein* the tort occurred over navigable water when the aircraft crashed into Boston Harbor. To reach such a conclusion one must totally disregard the actual facts of the Boston Harbor crash—facts which are chillingly identical to the facts of this crash. The facts of the Boston Harbor crash are reported in *Rapp* v. *Eastern Air Lines, Inc.,* 264 F. Supp. 673 (E.D. Pa. 1967)—one of the approximately 150 cases brought in

federal courts in Philadelphia and Boston as a result of the Boston Harbor tragedy—as follows:

On October 4, 1960, Eastern Air Lines Flight 375 crashed into the waters of Boston Harbor just outside Logan Airport in Boston, Massachusetts. The plane was on a commercial flight from Boston to Philadelphia. Fifty-nine passengers and the three crewmen were killed; 10 persons survived. The airplane was a Lockheed 188 Electra, a four-engine turbo-prop aircraft. The 501-D-13 engines had been designed and built by General Motors.

The flight took off from runway 9 which is 7,021 feet in length. The taxi out to the runway, the take-off roll, the lift-off and the climb were all normal. The aircraft climbed naturally to about 200 feet, when a burst of flame erupted very briefly and quickly from number one engine. After the burst of flame, the aircraft continued to climb for 200-300 feet, reaching a maximum of 400-500 feet, when the number one engine came to a complete stop and the propeller on number one was seen to rotate slowly. The aircraft then made a flat left turn and returned to its original heading parallel to the runway. Thereafter, the plane made another flat turn, the nose went up and it began to climb, after which it went into a steep left bank, with the right wing high. The crash followed. *A total of 47 seconds had elapsed from the take-off to the time of the disaster.*

The plane met a flight of starlings about 6/10ths of a mile from the beginning of the runway. Estimates of the amount of dead starlings found on the runway varied from 50 to 100. Five to ten dead gulls were also found in the same general area. A sufficient amount of bird material had penetrated into the air inlet of the plane as to cause the auto-feathering device to shut off number one engine or so as to cause a flameout and the crew to shut

off number one engine. At any rate, the ingestion of the birds into the air inlet caused the number one engine to shut off. (264 F. Supp. at 675; emphasis added)

The district court in *Weinstein* dismissed the libels filed in seven cases for lack of subject matter jurisdiction, holding that "Admiralty jurisdiction does not encompass tortious causes of action arising from crashes of airplanes into the navigable waters of a state." *Weinstein* v. *Eastern Airlines, Inc.*, 203 F. Supp. 430, 431 (E.D. Pa. 1961). In reaching this conclusion Judge Van Dusen said:

> . . . [R]esearch has failed to disclose any case where it has been held that admiralty had jurisdiction simply because an airplane, as opposed to a seaplane, crashed into the navigable waters of a state.
>
> * * *
>
> ". . . Just as vessels were the source of admiralty, they remain the focal point of admiralty jurisdiction. In very general terms, admiralty jurisdiction relates to things occurring on or to vessels or as a result of the employment of vessels."
>
> * * *
>
> "Transactions are maritime only when connected with a vessel." Robinson, Admiralty, § 8 (1939).
>
> * * *
>
> . . . Therefore, until Congress establishes such jurisdiction by statute, admiralty jurisdiction does not encompass causes of action arising from crashes of airplanes into the navigable waters of a state. . . .

(203 F. Supp. at 432, 433).

The Third Circuit rejected this narrow view of admiralty jurisdiction and reversed Judge Van Dusen. *Weinstein,* 316 F.2d 758. Chief Judge Biggs' learned opinion, well-grounded in the ancient law of admiralty and prophetic in its outlook, has withstood criticism[13] and the test of time; and has been cited, followed and quoted by many courts in the nine years since it was written. Judge Biggs said:

> The critical factor in determining whether a tort claim comes within the broad statutory grant of admiralty jurisdiction is the situs of the tort; i.e., the place where it happened. *If the tort occurred on navigable waters, the claim is one that lies within the jurisdiction of the courts of admiralty; nothing more is required.*
>
> * * *
>
> *Concepts of admiralty tort jurisdiction should not and cannot remain static and unchanging.* In Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21, 52, 55 S.Ct. 31, 41, 179 L.Ed. 176 (1934), the Supreme Court, by Mr. Chief Justice Hughes, stated: "We have had abundant reason to realize that our experience and new conditions give rise to new conceptions of maritime concerns. These may require that former criteria of jurisdiction

[13] The City, unable to locate any aviation cases in support of its position, points out that the American Law Institute criticized *Weinstein* in 1969 in its STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, p. 231 (1969). It is clear that the ALI's criticism of the case stemmed from the problems involved in "borrowing" a state's substantive law in those death cases occurring in territorial navigable waters. *E.g., Scott* v. *Eastern Airlines, Inc.,* 399 F.2d 14 (3d Cir.), *cert. denied,* 393 U.S. 979 (1968); *The Tungus* v. *Skovgaard,* 358 U.S. 588 (1959). All such problems have now been laid to rest by this Court's decision in *Moran*ge v. *States Marine Lines, Inc.,* 398 U.S. 375 (1970), which recognized a remedy for wrongful death under the general maritime law.

be abandoned, as, for example, they were abandoned is discarding the doctrine that the admiralty jurisdiction was limited to tidewaters."

* * *

. . . If, as it has been held, a tort claim arising out of the crash of an airplane beyond the one marine league line is within the jurisdiction of admiralty, then *a fortiori* a crash of an aircraft just short of that line but still within the navigable waters is within that jurisdiction as well. *To hold otherwise would be to impose an illogical and irrational distinction on the operation of the broad grant of admiralty jurisdiction extended by the Constitution and implemented by 28 U.S.C.A. § 1333.*

It is true that the libels in the cases on appeal allege, *inter alia,* negligence in the inspection and maintenance of the aircraft. These allegations refer to allegedly negligent acts committed on land for we cannot assume, in the absence of express averments to such effect, that maintenance of an aircraft or inspection thereof except for emergency purposes takes place in flight. Nonetheless, *if the disastrous effects of failure to properly inspect or maintain the aircraft occurred on navigable waters, as was alleged in the instant cases, the tort claims must be deemed to be within the admiralty jurisdiction.*

* * *

We are of the opinion for the reasons stated that the tort claims *sub judice* lie within the admiralty jurisdiction of the court below.

* * *

We hold, therefore, that tort claims arising out of the crash of a land-based aircraft on navigable waters within the territorial jurisdiction of a state are cognizable in admiralty. (316 F.2d at 761, 763, 765, 766, emphasis added.)

As in the *Choy* and *Wilson* cases it was argued that § 1509(a) of the Federal Aviation Act of 1958, 49 U.S.C. § 1509(a), precluded the exercise of admiralty jurisdiction as to aircraft crashes in navigable waters. "The brief correct answer to this contention," the court said, "is that the Federal Aviation Act is not a statute intended either to create or to limit judicial jurisdiction." 316 F.2d at 765. In *Scott* v. *Eastern Airlines, Inc.*, 399 F.2d 14 (3d Cir.) *cert. denied*, 393 U.S. 979 (1968), the Third Circuit sitting in bank affirmed the *Weinstein* panel's holding of admiralty jurisdiction.

The City has argued that *Weinstein* can be reconciled with this case because neither the trial court in *Weinstein* nor the Third Circuit was apparently aware of the fact that the cause of the Boston Harbor crash was bird ingestion into the aircraft's jet engines over land during takeoff. And they imply that had the Third Circuit only known of this fact it would have concluded that the locality of the tort was over land by virtue of the "controlling" longshoremen's compensation cases cited by it and relied on by the court below in this case. This argument is totally without merit. Judge Biggs pointed out in his opinion that "the libels in the cases on appeal allege, *inter alia*, negligence in the inspection and maintenance of the aircraft," which allegations refer to "negligent acts committed on land." 316 F.2d at 765. The allegations referred to can be read in the libels on file with the record in *Weinstein* in the Third Circuit. These allegations include the following:

> 8. On or about October 4, 1960, libellant's decedent was a passenger for hire in a certain Lockheed Electra Airplane N5533, owned, operated, possessed and controlled by Eastern Airlines, Inc.,

as a common carrier on a regularly scheduled flight to Philadelphia and points south, designated as Flight No. 375, which had departed from the Logan International Airport in Massachusetts at approximately 4 p.m.

9. Shortly after the said aircraft had become airborne, following takeoff from the said airport, *by reason of the negligence of the respondents,* and each of them, and by virtue of their respective breaches of warranties said aircraft *crashed into the navigable waters of Boston Harbor, causing libellant's decedent to suffer severe and disabling injuries resulting in his death.*

10. The respondent United States of America, through its various agencies including the Civil Aeronautics Administration, Civil Aeronautics Board and Federal Aviation Agency, through their respective agents, servants, workmen and employees, was careless and negligent under the circumstances, and by reason thereof proximately caused the injuries and death of the libellant's decedent, under the circumstances, in and by:

* * *

(f) *failing to take prompt, proper and adequate measures to meet the problem of bird ingestion by planes using said airport and to require proper and adequate measures to be taken to protect against said hazard;*

(g) *failing to exercise proper and adequate control over take-off of the aforesaid aircraft;*

* * *

15. The aforesaid crash and resulting injury and death of the libellant's decedent were caused by the carelessness and negligence of the respondent Lockheed Aircraft Corporation by its agents, servants, workmen and employees, under the circumstances in:

* * *

(c) *faling to properly and adequately test the power plants,* the various component parts, control devices and instrumentations thereof incorporated into said aircraft *for bird ingestion;*

(d) *failing to properly and adequately design, equip, test, alter, repair and replace air intakes,* instrumentation and controls over power plants of said aircraft to *permit safe take-off under circumstances where birds might be encountered.*

* * *

17. Solely by reason of the carelessness and negligence of the respective respondents, as aforesaid, and the breach of warranties by each of them, as set forth hereinabove, *libellant's decedent was caused to suffer painful and severe injuries and to wage an unsuccessful struggle for survival, as a consequence of which he succumbed to his injuries and or the elements, including the waters of the harbor in which the plane has crashed, and died therefrom.*[14]

With regard to the above allegations of negligence Judge Biggs went on to say, "if the *disastrous effects* of failure to properly inspect or maintain the aircraft *occurred* on navigable waters, as was alleged in the instant cases, the tort claims must be deemed to be within the admiralty jurisdiction." 316 F.2d at 765. It is obvious that the "disasterous effects" of the negligence which occurred on navigable waters refers to the crash of the aircraft into Boston Harbor, not the meeting of "a flight of starlings about 6/10ths of a

[14] Consolidated Brief and Appendix for Appellants in *Weinstein v. Eastern Airlines, Inc.*, United States Court of Appeals for the Third Circuit, Nos. 14023-14029, at pp. 5a-14a, emphasis added.

mile from the beginning of the runway" which resulted in bird ingestion into the jet-powered engines and caused "the auto-feathering device to shut off number one engine or so as to cause a flameout and the crew to shut off number one engine." *Rapp* v. *Eastern Air Lines, Inc.*, 264 F. Supp. at 675.

It is equally lame to argue that Judge Van Dusen was unaware of the actutal facts of the Boston Harbor crash. In *Rapp* v. *Eastern Air Lines, Inc.*, 264 F. Supp. 673, 675, the court said, "A total of 47 seconds had elapsed from the take-off to the time of the disaster." In *Weinstein* v. *United States*, 200 F. Supp. 448 (E.D. Pa. 1961), a second opinion written by Judge Van Dusen in cases arising out of the Boston Harbor crash, he said, "These admiralty actions . . . arise out of the crash of an airplane in navigable waters of Boston Harbor *one minute after lift off* from Logan International Airport, Boston, on October 4, 1960 . . ." (200 F. Supp. at 449, emphasis added). No one could seriously argue that a judge who knows that a plane crashed "one minute after lift off" from an airport could be unaware that the plane became "disabled" over land.

The simple truth is, in *Weinstein* the Third Circuit was squarely faced with the question of whether a case involving the crash of an aircraft into navigable territorial waters was cognizable in admiralty. The airplane had crashed shortly after takeoff because it became "crippled" over land when birds were ingested into its jet-powered engines. It "fortuitously" crashed in navigable waters nearby. Nevertheless, the Third Circuit held that such a case was within the jurisdiction of admiralty. In view of the amazing similarity

between the facts in this case and the facts of the Boston Harbor crash, there is no escape from the conclusion that the Sixth Circuit's decision here is in direct and irreconcilable conflict with the Third Circuit's decision in *Weinstein*. Judge Edwards acknowledged this conflict in his dissenting opinion when he said:

> . . . There are legal and policy questions of great portent for the future which this case requires us to answer. I believe that the facts of this case require us to accept or reject *Weinstein, supra,* and thus, to decide for this Circuit whether air ships, which are increasingly displacing water-borne ships in maritime commerce, are within the maritime jurisdiction when they crash on navigable waters (Pet. for Cert., App. A, p. 11a).

EJA submits that for all the reasons stated in (1) Judge Biggs' opinion in *Weinstein,* (2) Judge Edwards' dissenting opinion in this case, (3) the many lower court aviation admiralty cases both before and after *Weinstein,* and (4) this brief for Petitioners, this Court should decide that "air ships, which are increasingly displacing water-borne ships in maritime commerce, are within the maritime jurisdiction when they crash on navigable waters," and reverse the court below. (Pet. for Cert., App. A, p. 11a).

C. The Longshoremen's Compensation Cases Which the Court of Appeals Found "Controlling" Are Not Applicable to This Case.

Except for a brief reference to *Weinstein,* 316 F.2d 758, the court below in its opinion did not discuss, cite or attempt to distinguish any of the many admiralty

cases involving aircraft crashes in navigable waters. Instead, it said this case was "controlled" by three cases from this Court: two longshoremen's compensation cases dated 1928 and 1935, *Smith & Son, Inc.* v. *Taylor,* 276 U.S. 179 (1928), and *Minnie* v. *Port Huron Terminal Co.,* 295 U.S. 647 (1935); and one gangplank slip-and-fall case dated 1935, *The Admiral Peoples,* 295 U.S. 649 (1935). In concurring with Chief Judge Phillips, Circuit Judge McCree said, "I agree, as a matter of policy, with much of what Judge Edwards has written in support of the view that 'air ships . . . are within the maritime jurisdiction when they crash on navigable waters" (Pet. for Cert., App. A, p. 8a). But he too concluded that the question of locality of the tort was "foreclosed" by the above cases from this Court. It is interesting to note that neither in *Weinstein*—a case in which the aircraft became "disabled" over land—nor in *any* of the many reported aviation admiralty cases can one find a discussion of or a reference to these three cases which the court of appeals found "controlling." A review of these three cases and the historical context in which they were decided shows why they have not been discussed in aviation admiralty cases; why they are not applicable to this case; why their "refined distinctions are now of historic and academic interest only," *Pure Oil Co.* v. *Snipes,* 293 F.2d 60, 65 (5th Cir. 1961); and why these refined distinctions should not now be injected into an area which has heretofore been free from "litigation-spawning confusion" because it is "easily susceptible of more workable solutions." *Moragne* v. *States Marine Lines,* 398 U.S. 375 404 (1970).

In *Smith & Son, Inc.* v. *Taylor*, 276 U.S. 179 (1928) —a case heavily relied upon by the City and Dicken and found to be "controlling" in this case by the court of appeals—a longshoreman was standing on a stage which projected a few feet over the water near the side of a vessel but rested upon the wharf. A sling loaded with cargo was lowered over the side "by means of a winch on the vessel." The sling was swinging back and forth and as the longshoreman tried to catch and steady it, "the sling struck him and knocked him off the stage into the water where sometime later he was found dead." 276 U.S. at 181. This Court held that the tort occurred on the wharf, an extension of the land, and the case was therefore not within the admiralty and maritime jurisdiction.[15] In a brief opinion Mr. Justice Butler wrote:

> The blow by the sling was what gave rise to the cause of action. It was given and took effect while deceased was upon the land. It was the sole, immediate and proximate cause of his death.

The City's argument has been the same throughout this case: the above language must be mechanically applied to the facts of this aircraft crash, and when that is done the conclusion is inescapable that the locality of the tort here is over land—where the aircraft first became disabled. That argument was accepted by the court below despite the fact that in thirty years of aviation admiralty cases *no* court had ever found *Smith & Son* to be applicable. Indeed, *Smith & Son* has little, if any,

[15] In 1935 the converse of this factual situation was presented to this Court in *Minnie* v. *Port Huron Terminal Co.*, 295 U.S. 647 (1935). That is, in *Minnie* the injured longshoreman was working on a vessel lying in navigable waters when struck by a sling and "precipitated" upon the wharf. This Court found the tort to be a maritime tort.

vitality today even in its own area—maritime personal injury litigation brought by longshoremen and harbor workers.

In 1904 Mr. Justice Holmes observed that "The precise scope of admiralty jurisdiction is not a matter of obvious principle or of very accurate history." *The Blackheath*, 195 U.S. 361, 365 (1904). Nowhere is that phrase more applicable than in the field of maritime personal injury litigation — especially those cases brought by stevedores, longshoremen and other harbor workers engaged in an occupation which has "a higher injury frequently rate than any other high-hazard industry" in the nation. *Victory Carriers, Inc.* v. *Law*, — U.S. —, 30 L.Ed.2d 383, 393, n. 15. The story surrounding that field of litigation since the turn of the century is well known to this Court and has been stated several times in recent cases. *E.g., Calbeck* v. *Travelers Ins. Co.*, 370 U.S. 114 (1962); *Nacirema Operating Co.* v. *Johnson*, 396 U.S. 212 (1969); *Victory Carriers, Inc.* v. *Law*, — U.S. —, 30 L.Ed.2d 383 (1971). In commenting on the revolution which has taken place concerning the rights of maritime workers and seamen for recovery for death and injury one writer has said:

> Many of the old landmarks have disappeared for good. New ones have been tossed up, which may or may not be permanent additions to the map. There are unsuspected reefs whose existence will be determined by the usual method of hit or miss. The perils of the sea, which mariners suffer and shipowners insure against have met their match in the perils of judicial review.[16]

In order to put *Smith & Son* in its proper perspective

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[16] Gilmore & Black, The Law of Admiralty 248 (1957).

for this case it will suffice to summarize this revolution as follows: In 1914 when a stevedore injured in the hold of a vessel was before this Court in *Atlantic Transport* v. *Imbrovek,* 234 U.S. 52 (1914) with a libel in admiralty, the common law defenses of contributory negligence, fellow servant rule, etc. were devastating to injured employees; no state workmen's compensation remedies were then available to longshoremen; there was no federal compensation act applicable to longshoremen and harbor workers; and longshoremen did not come within the traditional maritime remedies available to seamen under the general martime law. *See The Osceola,* 189 U.S. 158 (1903). The injured longshoreman in *Imbrovek* therefore filed a libel in admiralty against his employer on the ground that the tort involved was maritime. The employer argued that the tort was nonmaritime because it did not arise "out of an injury to a ship . . . or out of an injury to a person by the negligence of a ship." 234 U.S. at 61. In a historic opinion that has been followed to this day, Mr. Chief Justice Hughes said, "This view we deem to be altogether too narrow." *Id.* This Court allowed the longshoreman his remedy in admiralty saying, "As the *injury* occurred on board a ship while it was lying in navigable waters, there is no doubt that the requirement as to locality was fully met." 234 U.S. at 58, emphasis added.

By 1917 many states had passed workmen's compensation acts and the question for longshoremen became—can such acts constitutionally be applied where the tort involved is a maritime tort? In *Southern Pacific Co.* v. *Jensen,* 244 U.S. 205 (1917), in a five-to-four decision, this Court answered that question in the negative. As this Court noted in *Calbeck* v. *Travelers Ins. Co.,* 370 U.S. 114, 118 (1962), "The Jensen decision deprived

many thousands of employees of the benefits of workmen's compensation." In fact, it deprived compensation to all of those longshoremen injured "seaward of the Jensen line"—a line usually drawn at the gangplank of the ship. Two attempts by Congress to overrule *Jensen* legislatively failed. *See Knickerbocker Ice Co.* v. *Stewart,* 253 U.S. 149 (1920); *Washington* v. *Dawson & Co.,* 264 U.S. 219 (1924). The harsh results of *Jensen* began to become apparent in subsequent cases. In *Western Fuel Co.* v. *Garcia,* 257 U.S. 233 (1921), for example, the widow and child of a stevedore killed seaward of the Jensen line went remediless.

In an effort to avoid such results this Court "handed down a number of decisions which appeared to modify Jensen. . . ." *Calbeck* v. *Travelers Ins. Co.,* 370 U.S. at 118. One such effort was the "maritime but local" exception which allowed state law to apply to "certain local matters . . . which would work no material prejudice to the general maritime law." *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U.S. 469, 477 (1922). Another was a decision ruling that stevedores were "seaman" for purposes of the Jones Act,[17] a statute passed by Congress in 1920 to provide the benefits of the Federal Employers Liability Act[18] to seamen, and could therefore obtain redress under that statute. *International Stevedoring Co.* v. *Haverty,* 272 U.S. 50 (1926). Another way to avoid the harsh results of *Jensen* was to find that the tort occurred on land, thereby giving the longshoreman a remedy under the state workmen's compensation act. In *Smith & Son* the deceased longshoreman's widow sought and obtained state workmen's compensation benefits from the stevedore employer in a Louisiana

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[17] 46 U.S.C. § 688.

[18] 45 U.S.C. §§ 51-60.

state court. On appeal the employer's defense was that no benefits were payable (and the state compensation act was inapplicable) because the tort involved was maritime. The widow, of course, sought to uphold her compensation award by arguing that the tort occurred landward of the Jensen line. As Judge Edwards noted in his dissenting opinion in this case:

> I make no suggestion that there is a simple consistency to be found in the reasoning of all these cases.
>
> Harsh facts frequently appear to have affected results. The *Smith & Sons* case, for example, preceded the effective date of the federal Longshoremen's Compensation Act and upheld a state compensation award. The holding of the court was to deny that "the case is *exclusively* within admiralty jurisdiction" as appellants therein were claiming. (Pet. for Cert., App. A, p. 15a).

The revolution in the law for longshoremen since the days when Mrs. Taylor's lawyer sued her husband's employer, Smith & Son, Inc., in Louisiana state court for workmen's compensation benefits have relegated the *Smith & Son* case to a virtual museum piece. First, Congress was finally successful in 1927 in passing a federal compensation statute applicable to harbor workers. The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950. It is important to note that Congress did not, in writing the jurisdictional portion of the Act, refer to such amorphous phrases as "where a cause of action arises." Instead, it made jurisdiction dependent upon where the *injury occurred*. Section 3 of the Longshoremen's Act, 33 U.S.C. § 903 (a), provides in part:

> (a) Compensation shall be payable under this chapter in respect of disability or death of an em-

> ployee, but only if the disability or death results from an *injury occurring* upon the navigable waters of the United States (including any dry dock) . . . (emphasis added).

In 1932 this Court upheld the constitutionality of the Longshoremen's Act. *Crowell* v. *Benson,* 285 U.S. 22 (1932). Mr. Chief Justice Hughes noted, "As the Act relates solely to injuries occurring upon the navigable waters of the United States, it deals with the maritime law, applicable to matters that fall within the admiralty jurisdiction." 285 U.S. at 39. And he pointed out that where navigability of the waters was not in dispute, it was the locality of the injury which determined "the existence of the congressional power to create the liability prescribed by the statute." *Id.* at 55.

How have the courts decided factual situations like those arising in *Smith & Son* under § 903 of the Longshoremen's Act? First, they have held that there is no difference between the "traditional test of admiralty jurisdiction" and "the test of whether an accident occurs 'upon navigable waters' under the Longshoremen's Act. . . ." *Caldaro* v. *Baltimore and Ohio R.R. Co.,* 166 F.Supp. 833, 836 (E.D.N.Y. 1956). And in two cases involving factual situations nearly identical to *Smith & Son,* two Circuit Courts of Appeal reached the conclusion that the claimants' awards under the Longshoremen's Act could stand because the torts were maritime. *Michigan Mutual Liability Co.* v. *Arrien,* 344 F.2d 640 (2d Cir.), *cert. denied,* 382 U.S. 835 (1965); *O'Keeffe* v. *Atlantic Stevedoring Co.,* 354 F.2d 48 (5th Cir. 1965). In the *O'Keeffe* case a longshoreman was standing on the dock hooking on cargo which was being loaded into the hold of a ship by the ship's boom. One of the metal bands around the cargo caught

him by the leg as the cargo was being raised. He was jerked upside down and carried up with the cargo. The winch was stopped but the longshoreman fell loose, striking the ship with his head and then drowning in the slip. The district court enjoined the payment of compensation benefits under the Longshoremen's Act on the ground that the tort was nonmaritime. *Atlantic Stevedoring Co.* v. *O'Keeffe,* 220 F.Supp. 881 (S.D. Ga. 1963). It found that the following language of *Smith & Son* controlled: "the blow by the sling was what gave rise to the cause of action . . .," and "the substance and consummation of the occurrence which gave rise to the cause of action took place on the land." The district court said, "So far as I have been able to determine those doctrines of Smith v. Taylor, supra, as to causation and locality, have never been reversed and so far as I can determine, they have never been changed by legislation." 220 F.Supp. at 886. The Fifth Circuit reversed, saying, "It is true that *when the causal chain of events commenced,* Curry [the deceased] was on the dock and not upon navigable waters. But *the beginning of the causal sequence* was the lifting of Curry from the dock by the metal band suspended from the ship's boom. . . . We are firmly of the view that Curry sustained his injury over navigable water." 354 F.2d at 50, emphasis added.

In *Michigan Mutual Liability Co.* v. *Arrien,* 344 F.2d 640 (2d Cir.), *cert. denied,* 382 U.S. 835 (1965), the longshoreman at the time of the accident was standing on a "skid"—a wooden platform extending from the wharf over the water. A pallet suspended from the vessel's cables broke, spilling cargo onto the skid and into the water. A case struck the longshoreman's leg and knocked him into the water. He did not drown

but suffered totally-disabling injuries. Compensation was awarded under the Longshoremen's Act and the Second Circuit, by a divided vote, affirmed. The Second Circuit said, "We believe *T. Smith & Son, Inc.* v. *Taylor,* 276 U.S. 179 (1928), inconclusive, as well as outdated, authority for the proposition that the skid must be considered an extension of land outside the reach of the Longshoremen's Act." 344 F.2d at 644. The dissenting judge said, "The decision of the court is contrary to decisions of the Supreme Court and of this court virtually identical in their factual setting. *T. Smith & Son, Inc.* v. *Taylor.* . . ." 344 F.2d at 647. A petition for certiorari was denied by this Court. 382 U.S. 835.

The Longshoremen's Act and the decisions thereunder are not the only reasons why *Smith & Son* is considered "inconclusive, as well as outdated authority" today. As a result of the "revolution" in the law in this area referred to above, longshoremen and their beneficiaries no longer even sue their employers for compensation benefits when injured or killed in the course of their employment. In 1944 and 1946 two decisions by this Court transformed a shipowner's liability to seamen for unseaworthiness of a vessel from a duty to use due care to an absolute duty. *Mahnich* v. *Southern S.S. Co.,* 321 U.S. 96 (1944); *Seas Shipping Co.* v. *Sieracki,* 328 U.S. 85 (1946). These decisions became important to longshoremen in 1953 when this Court held that a harbor worker injured on board a vessel while making repairs could sue the shipowner in admiralty on a claim of unseaworthiness. *Pope & Talbot, Inc.* v. *Hawn,* 346 U.S. 406 (1953). With longshoremen now considered to be "seamen" for purposes of admiralty claims against shipowners for injuries or death

caused by unseaworthiness, and with unseaworthiness amounting to absolute liability without fault, the entire format of harbor workers' personal injury litigation changed drastically. Today when a longshoreman is injured or killed seaward of the Jensen line, limited compensation is not sought from the stevedore employer under the Longshoremen's Act. Instead, an action is filed against the shipowner for unlimited damages under a claim of unseaworthiness, usually while the injured longshoreman receives voluntarily-paid compensation benefits from his employer, who will be reimbursed by the employee out of the longshoreman's judgment against the shipowner. And with the passage of the Admiralty Extension Act [19] by Congress in 1948, longshoremen injured landward of the Jensen line may follow this same format if their injury was caused by the unseaworthiness of the vessel or its cargo or cargo containers. *See Gutierrez* v. *Waterman S.S. Corp.*, 373 U.S. 206 (1963); *cf. Victory Carriers, Inc.* v. *Law*, — U.S. —, 30 L.Ed.2d 383 (1971). Since Mr. Taylor was struck by a sling loaded with cargo which was being lowered over the side "by means of a winch on the vessel," 276 U.S. at 181, it is clear that if Mrs. Taylor's lawyer were handling her case today he would not seek limited compensation benefits under either a state workmen's compensation act *or* the Longshoremen's Act. He would instead sue the owner of the vessel for unlimited damages caused by unseaworthiness and/or negligence. It is this revolution which caused Judge John R. Brown of the Fifth Circuit to make the following observation about *Smith & Son*,

[19] 46 U.S.C. § 740.

Minnie v. *Port Huron* and *The Admiral Peoples*[20] when deciding the case of an oil driller injured while working on a fixed drilling platform in the Gulf of Mexico when he fell from a tank on top of the platform, struck the platform deck 15 feet below, and dropped through a hole in the platform into the ocean 50 feet below, striking at least two more steel structure members on the way down:

> . . . Many of these refined distinctions are now of historic and academic interest only since Congress cut through many of them by the 1948 Act which extends admiralty and maritime jurisdiction to "all cases of damage or injury, to person or property, caused by a vessel on navigable water,

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[20] In discussing the reasoning behind the gangplank slip-and-fall cases like *The Admiral Peoples*, Mr. Benedict stated in his treatise:

> Where a person falls from a vessel onto a pier, or, conversely, falls from a pier onto a vessel, or falls from a gangway or a ladder in passing between a ship and the shore, it was for a long time considered that the person, in going aboard the vessel, was still on shore until he passed the ship's rail, and conversely that in leaving the vessel, he was still on board until he arrived upon the solid pier or land. The Supreme Court, however, has now settled the matter by declaring that gangways (inferentially ladders) are always parts of the vessel; hence a person injured while on a gangplank or ladder is in every case to be considered as on board the ship, no matter whether he is coming aboard or going ashore at the moment. 1 BENEDICT ON ADMIRALTY 358 (6th Ed. 1940, Knauth Supp. 1971).

One commentator has made the following remark about *The Admiral Peoples*:

> Since a "tort," a mental construction, doesn't "take place" anywhere, the application of this "test" gives rise to an open series of "and-now-what-if's." reminiscent intellectually of those discussions of fine points in the law of keeping bees which once rang in the Halls of Tara, and pictorially of the Marx Brothers running up and down gangplanks one jump ahead of the cops. Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 Col. L.Rev. 259, 264 (1950).

notwithstanding that such damage or injury be done or consummated on land." 46 U.S.C.A. § 740. (*Pure Oil Co.* v. *Snipes,* 293 F.2d 60, 65 (5th Cir. 1961)

If the "refined distinctions" of the three cases which the court below found to be controlling are "now of historic and academic interest only," what possible reason is there why they should now be engrafted for the first time upon cases involving crashes of aircraft into navigable waters—an area which has heretofore been free from "litigation-spawning confusion" because it is "easily susceptible of more workable solutions"? *Moragne* v. *States Marine Lines,* 398 U.S. 375, 404 (1970). For thirty years the aviation cases have looked to the locality of the *accident—i.e.,* the crash itself—to determine admiralty tort jurisdiction. That is not only in keeping with "the historic view of this Court," *Victory Carriers, Inc.* v. *Law,* 30 L.Ed.2d at 387, it is in keeping with a common-sense, practical solution of problems which can and do arise in an area far more technologically complex and sophisticated than slip-and-fall cases. As the district court said in *Thomson* v. *Chesapeake Yacht Club, Inc.,* 255 F.Supp. 555, 557-558 (D. Md. 1965):

> It is difficult, if not impossible, to reconcile the opinions in such cases as . . . *Wiper* [*Wiper* v. *Great Lakes Engineering Works,* 340 F.2d 727 (6th Cir. 1965] with the opinions in the . . . aircraft cases.
>
> * * *
>
> The aircraft cases present special problems. Although the negligence may have occurred on land, where there was negligent maintenance, the impact (effect) of the negligence on the passengers did not occur until something went wrong during the flight and the plane started to fall. Something may have started to go wrong over the land before the

> plane reached the sea, but that is usually impossible to prove one way or the other in aircraft cases, *and the decisions adopt a practical approach.* (Emphasis added).

EJA submits that there is nothing practical about the approach adopted by the court below in this case. Instead of looking immediately to the impact point of the crash to determine admiralty tort jurisdiction—a point which is always determined by official accident investigators in any aircraft accident and which was determined in this case to be in the navigable waters of Lake Erie one-fifth of a statute mile from shore (A. 21)—the court below has ruled that the locality of the tort is to be determined by looking to the point where the aircraft first becomes "disabled." As we have seen in this case, the result of such a rule is two years of appellate litigation discussing the fine points of where longshoremen first became injured. And it is a virtual certainty that this rule will spawn its share of litigation in the future as aircraft (and later spacecraft) fly higher and faster over land and sea. Aviation accident litigation is often multiparty and even multidistrict, and one side or the other usually desires to establish the applicability of one substantive law rather than another. Thus, under the rule established in this case the courts can look forward in the future to engaging in such metaphysical exercises as trying to determine where the "cause of action arises" where a supersonic transport crashes more than one marine league from the shore after radioing over New Jersey at 70,000 feet altitude that it is experiencing difficulty. Or the courts could grapple with the question of where "the substance and consummation of the occurrence which gave rise to the cause of action took place" when an aircraft experiences difficulty over land above an

airport located, as many airports are, at the water's edge and circles for an emergency landing, passing first over water, then land, then water, then land and finally crashing in navigable waters just off the end of the runway.

Looking backward over nearly 60 years of litigation in the field of longshoremen's personal injuries, and forward into the technological advances and complexities which can be expected in the field of aviation and space, one can find little in the former to recommend to the latter for adoption. For thirty years the aviation cases have progressed smoothly with the following rule: "tort claims arising out of the crash of a land-based aircraft on navigable waters are cognizable in admiralty." *Weinstein* v. *Eastern Airlines, Inc.*, 316 F.2d at 761. The reasons behind such a rule were ably stated by Judge Biggs in *Weinstein* and Judge Edwards in his dissenting opinion in this case. Judge Biggs wrote in *Weinstein:*

> . . . At the time the Constitution was framed and for a century and a half thereafter, ships of various kinds were the only means of transportation and commerce on or across navigable waters. Today, aircraft have become a major instrument of travel and commerce over and across these same waters. *When an aircraft crashes into navigable waters, the dangers to persons and property are much the same as those arising out of the sinking of a ship or a collision between two vessels.* "There can be nothing more maritime than the sea." Pure Oil Co. v. Snipes, 293 F.2d 60, 65 at n. 6 (5 Cir. 1961) (316 F.2d at 763, emphasis added)

And in his dissenting opinion in this case Judge Edwards said:

> I believe that there are many comparisons between the problems of aircraft over navigable

waters and those of the ships which the aircraft are rapidly replacing. We should take judicial notice that thousands of flights of aircraft take off daily (many from waterfront airports like Cleveland's Burke Lakefront) with flights planned over the oceans or over the Great Lakes.

I have previously noted that Congress appears to have thought that admiralty jurisdiction attached solely by flight over the high seas. We have, however, no need to go that far in our instant case. We deal here with a disabled plane which crashed upon and sank into the navigable waters of the Great Lakes. Problems posed for aircraft landing on, crashing on, or sinking into navigable waters differ markedly from landings upon land. Arguably, they might be greater or less, but they are not the same. In such instances, wind and wave and water, the normal problems of the mariner, become the approach or survival problems of the pilot and his passengers. I do not, by referring generally to these matters as being within judicial notice, mean to pass judgment on jurisdictional problems beyond the specific requirements of this case. *What I would hold is that tort cases arising out of aircraft crashes into navigable waters are cognizable in admiralty jurisdiction even if the negligent conduct is alleged to have happened wholly on land.* (Pet. for Cert., App. A, p. 24a, emphasis added).

There are other beneficial effects to the judicial system and to litigants from the *Weinstein* rule. At first blush the court of appeals' holding in this case might seem attractive to those holding a restrictive view of the jurisdiction of federal courts. Thus, in this very case one might conclude that the state court in Cleveland would be the most appropriate forum to deal with this case rather than the federal court there. Such an approach completely ignores the actual reali-

ties involved in aviation accident litigation. For example, in this case the Sixth Circuit has not reduced the work load of the district court in Cleveland; it has simply multiplied litigation by causing both the district court and the state court in that city to litigate the same issues of fact. That is, the United States (respondent Dicken's employer) could be sued here only in federal court.[21] Thus, if the Sixth Circuit's opinion stands in this case EJA will not be able to have a joint trial against both tortfeasors in federal court, but will be forced to litigate its Tort Claims action against the government in federal court and conduct an identical law suit against the City in state court "across the street."[22]

This phenomenon is a daily problem in aviation accident litigation because of the government's pervasive involvement in all aspects of aviation—such as air traffic control, regulation of air carriers and aircraft manufacturers, licensing of pilots, etc. A federal forum in aviation accident cases involving major accidents allows the litigants possible access to the Panel on Complex and Multidistrict Litigation (and transfer for discovery) under 28 U.S.C. § 1407; transfer for discovery and trial under 28 U.S.C. § 1404(a); and the ability to join the United States as a defendant or a third-party defendant. The application of federal general maritime law in admiralty cases insures uniformity of decisions and uniformity of results in multiparty cases, and eliminates complex choice of law problems. These everyday aspects of litigation do not escape the practitioner's notice in this field, and they undoubtedly account for the large number

[21] 28 U.S.C. § 1346(b).

[22] There is no diversity between EJA and the City.

of aviation accident cases being litigated in federal courts. The fact is, the Sixth Circuit's opinion here will *not* relieve the workload of the federal courts; it will simply multiply litigation and increase the workload of the entire court system—state and federal.

For all of the above reasons EJA submits that this Court should reverse the court below and establish the following rule for aviation cases:

> *When an aircraft crashes in navigable waters tort claims arising out of the accident are within admiralty and maritime jurisdiction.*

II

If More Is Required Than the Locality of the Tort in Order to Give Admiralty Jurisdiction, the Relation of the Wrong in This Case to Maritime Service, Navigation, and Commerce on Navigable Waters Is Quite Sufficient

Despite the fact that the district court in this case found that the locality of the tort was over land, it went on to hold that "there exists no relationship between the 'wrong' alleged in this case and some maritime service, navigation or commerce upon navigable waters." Pet. for Cert., App. B, p. 41a. The court of appeals affirmed the district court's finding as to the locality of the tort and said, "it is not necessary to consider the question of maritime relationship or nexus. . . . " Pet. for Cert., App. A, p. 6a. In view of this posture of the case it will not be enough for this Court simply to reverse the court of appeals' conclusion as to the locality of the tort. This Court must affirmatively find that this case is within the jurisdiction of admiralty. In so doing it will not be necessary to enter into any extended discussion of the merits of a "locality plus" rule. It will be sufficient to adopt the following language of this Court, written in 1914

by Mr. Chief Justice Hughes, in *Atlantic Transport* v. *Imbrovek*, 234 U.S. 52, 62 (1914):

> If more is required than the locality of the wrong in order to give the court jurisdiction, the relation of the wrong to maritime service, to navigation, and to commerce on navigable waters, was quite sufficient.

The ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969) recommends that Congress amend 28 U.S.C. § 1333 to state a "locality plus" rule, arguing that "The Federal courts should not be burdened with every case of an injured swimmer." *Id.* at 233. Legislative amendments are not, of course, addressed to this Court. Nor does this Court have before it a "case of an injured swimmer." *Cf. Chapman* v. *City of Grosse Pointe Farms*, 385 F.2d 962 (6th Cir. 1967); *McGuire* v. *City of New York*, 192 F. Supp. 866 (S.D.N.Y. 1961).[23] The present case involves the crash of an aircraft into waters which are admittedly navigable. In light of *Imbrovek*, EJA submits that the following comments by Judge Biggs in *Weinstein* and Judge Edwards in the dissenting opinion in this case properly dispose of this matter. Judge Biggs said in *Weinstein*:

> Assuming *arguendo* that some kind of maritime nexus in addition to locality is required as a prerequisite to admiralty tort jurisdidtion, we believe nonetheless that the cases at bar are within the admiralty jurisdiction insofar as the tort claims alleged therein are concerned. At the time the

[23] It should be noted that in *Chapman* the swimmer was injured in "approximately 18 inches of water." 385 F.2d at 963; and in *McGuire* the court deemed it "questionable" whether the waters where the swimmer was injured were in fact navigable. 192 F. Supp. at 867.

> Constitution was framed and for a century and a half thereafter, ships of various kinds were the only means of transportation and commerce on or across navigable waters. Today, aircraft have become a major instrument of travel and commerce over and across the same waters. When an aircraft crashes into navigable waters, the dangers to persons and property are much the same as those arising out of the sinking of a ship or a collision between two vessels. (316 F.2d at 763)

And Judge Edwards said in his dissenting opinion in this case:

> Here the aircraft took off from a shorefront airport; its flight path led over navigable waters (if only for a brief distance); when disabled, it fell into navigable waters; and the damage complained of is occasioned by crashing into and sinking into navigable waters.
>
> We cannot by any means be sure that the Supreme Court will not adhere or revert to the "locality alone" test, but in the meantime *we should note that there is some maritime character to any flight of any airplane over any navigable water.*
>
> If, as a result of shore-based negligence in dry dock, a sea valve were left open on a deep-water vessel, would anyone doubt admiralty jurisdiction over cases arising from its subsequent sinking?
>
> I think we should adopt the Third Circuit rule of *Weinstein, supra.*
>
> "We hold, therefore, that tort claims arising out of the crash of a land-based aircraft on navigable waters within the territorial jurisdiction of a state are cognizable in admiralty." 316 F. 2d at 766.

> This would not require endorsing its "locality alone" test, but, as is obvious from what has been said, I would accept fully much of Judge Biggs' reasoning.... (Pet. for Cert., App. A, p. 25a, emphasis added)

It is an undeniable fact of life in 1972 that the overwhelming majority of passengers crossing the high seas and other navigable waters (such as the Great Lakes) do so in aircraft ranging from EJA's corporate jet to huge 747 aircraft carrying 350 passengers, rather than in ships. The 1970 edition of *The Federal Aviation Administration's Handbook of Aviation* states that during the calendar year 1969 approximately 148.1 million passengers enplaned on this country's certified air carrier fleet, a 5 percent gain over calendar year 1968. (Pages 57 and 58). While all of these passengers did not travel over navigable waters, some 6.3 million of them traveled by air to Europe alone. (*Id.* p. 89). In calendar year 1969 approximately 16.8 million passengers traveled by air and sea between the United States and foreign countries. Of that number 15.3 million passengers, or *90.9 per cent of all such passengers, traveled by air.* (*Id.* p. 89). Considerable cargo is also carried over navigable waters in aircraft. In fact, entire airlines exist today just to fly air freight, much of it across the ocean.

If aircraft are heavily involved in such commerce, is it nonmaritime commerce just because they fly *over* the navigable waters instead of sailing on them? That argument has been consistently rejected since it was first proposed. *E.g., Wilson* v. *Transocean Airlines*, 121 F. Supp. 85 (N.D. Calif. 1954).

"Service" and "navigation" both play extremely important roles in the course of this maritime air

commerce—perhaps more so than was ever the case with vessels. Air traffic controllers maintain separation of aircraft flying across the seas to avoid mid-air collisions, just as ships must avoid collisions at sea. Aircraft landing and taking off must be controlled and guided by others just as ships must be piloted by others through narrow straits and channels to reach their piers. Airports must be kept free of hazards to this air navigation just as ships and channels must be kept free of hazards to ship navigation. And airports like Burke Lakefront—which was actually built by filling in navigable water—have special maritime problems because of hazards caused by seagulls which roost on breakwaters, runways, taxiways and the like; and which fly inside the airport's control zone and become a hazard to safe air navigation and commerce.

EJA submits that the wrongs alleged in its complaint—that respondents failed to remove the hazards to navigation and commerce "on, over and adjacent" to the airport, and failed to provide proper services and navigational control over the aircraft by clearing it for takeoff into the seagulls—have all the relationship to the service, navigation and commerce of aircraft flying over navigable waters that could possible be required in this case.[24]

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[24] As Judge Wisdom recently concluded with respect to a maritime relationship in *Watz* v. *Zapata Off-Shore Co.*, 431 F.2d 100, 111, at note 14 (5th Cir. 1970):

> Those cases which have demanded some maritime connection see note 12 *supra* have demanded only a minimum. [Note 12 cites *Smith* v. *Guerrant*, 290 F. Supp. 111 (S.D. Tex. 1968); *Chapman* v. *City of Grosse Pointe Farms*, 385 F.2d 962 (6th Cir. 1967); *Thomson* v. *Chesapeake Yacht Club*, 255 F. Supp. 555 (D. Md. 1965); *McGuire* v. *City of New York*, 192 F. Supp. 866 (S.D.N.Y. 1961).]

CONCLUSION

For the reasons stated petitioners Executive Jet Aviation, Inc., and Executive Jet Sales, Inc. pray that the judgment of the court of appeals be reversed; that petitioners' complaint be held to be within the admiralty and maritime jurisdiction of the court; that the cause be remanded to the district court for trial; and that petitioners have all the costs of these appeals.

Respectfully submitted,

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